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**Division II**  
**State of Washington**  
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NO. 57061-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

MICHELLE M. OSBORN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
CLALLAM COUNTY, STATE OF WASHINGTON  
Clallam County Superior Court No. 22-1-00011-05

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BRIEF OF RESPONDENT

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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether sufficient evidence supported the trial court's decision to allow remote testimony of a witness who was positive for COVID-19 during the pandemic?
2. Whether remote testimony of a witness who was positive for COVID-19 during the pandemic was necessary and testimony was reasonably assured?
3. Whether any violation of Osborn's right to confrontation by allowing remote testimony was harmless beyond a reasonable doubt?
4. The State concedes insufficient evidence supported the conviction for Theft in the Second Degree?
5. Whether the claim of ineffective assistance of counsel for failing to object to inadmissible evidence of value regarding the stolen change machine is moot?

## **II. STATEMENT OF THE CASE**

During the middle of the COVID-19 pandemic, Ms. Osborn was brought to trial in Clallam County where the

numbers reflecting new COVID-19 cases in the population were particularly high. RP 40. On the Friday prior to the commencement of the trial the following Monday, the infection rate was approximately 600 per 100,000 persons. RP 36, 40. About 50 people showed up for jury duty. RP 36.

Osborn was charged with Burglary in the Second Degree, Malicious Mischief in the Second Degree, and Theft in the Second Degree. RP 45–46; CP 72–73.

To prove Theft in the Second Degree, Jury instruction no. 16 required the State to prove that Osborn wrongfully obtained property of another that exceeded \$750.00 in value. CP 50. Value was defined in instruction no. 18 as “the market value of the property at the time and in the approximate area of the act.” CP 52. The jury instructions did not define “market value” any further. CP 32–54.

Prior to jury selection, the deputy prosecutor informed the court that he was just notified the night before the trial that one of its witnesses, Mike Simonson, was positive for the

COVID-19 infection and was currently isolating himself from other people and if permitted would testify remotely from home. RP 38–39.

The State reported that Mr. Simonson would not be an identification witness and would not be testifying regarding who was in the surveillance footage in the case. RP 39. Additionally, the State pointed out that Mr. Simonson was “simply going to be talking about his role at the port and what he observed . . . at the scene” and that the photographs would supplement his testimony. RP 39. The State requested that Mr. Simonson be permitted to testify remotely from home via Zoom. RP 40. The defense objected. RP 40.

The trial court ruled as follows:

So under the circumstances, I'm going to go ahead and allow Mr. Simonson to testify via Zoom. I know it would be better for -- be better to have him here, but he's one of many witnesses. It sounds like he's not identifying anything. It sounds like the State has set it up to where he's going to be able to reference any report he wrote or any statement he wrote if he needs to.

...



Okay, yeah. And so that's pretty high. I mean, we have been higher. We were higher in last August at like 12 hundred, but that's coming down. So I think under the circumstances, I'm going to allow that witness to testify via Zoom. And again for the record, we're in the middle of COVID, It's -- our numbers are coming down a little bit but Clallam County has particularly high numbers. I think it was 600-something per 100,000 as of Friday.

RP 40–41.

Defense counsel renewed his objection for the record but did not request a continuance. RP 41.

### **Trial Testimony**

The State's first witness was Chris Rasmussen, the public works and operations manager at the Port of Port Angeles (hereinafter "Port"). RP 180–81. Rasmussen oversaw security at the marina. RP 181. The Port built the laundry facility in 2016 at East Port Haven. RP 182. Access to the laundry facility requires an access card issued by the harbor master. RP 183–84. Rasmussen's duties included generating estimates of damage when damage is reported and he has access to the financial records of the Port. RP 186–88.

On Oct. 3, 2021, Rasmussen received an incident report involving damage at the laundry facility at East Boat Haven. RP 189. The next day, Rasmussen went to the laundry facility to observe the damage. RP 190. Rasmussen testified that something had been sprayed onto the dome camera in the laundry facility and that the change machine and counter for folding clothes had been torn out. RP 190. Rasmussen obtained an estimate on the cost to repair the damage and replace the change machine from Northwest Laundry Supply. RP 192.

Rasmussen testified that the estimate of the repairs was set forth on Exhibit 19. RP 194. The actual cost of the cash machine was \$2,025 in 2016. RP 199. The total cost of repairs including tax was \$3,694.02. RP 204–05. The replacement change machine cost the Port \$2,600.18. RP 205–06.

Mike Simonson was the operations supervisor for the Port and testified by remote video. RP 190, 208. Simonson was relatively new to the job and was not very familiar with the laundry facility except that he knew where and what it was. RP

211–12. On Oct. 3rd, 2021, after being alerted to an incident in the laundry room, Simonson took photos of the interior and exterior of the laundry facility showing the damage to the interior where the change machine had been forcibly removed. RP 211–12. Simonson also photographed a severed power cable. RP 212. Simonson photographed the exterior of the facility to show there were no signs of forced entry. RP 212. The photographs also showed damage to a countertop that had been snapped off inside the facility. RP 213. Simonson also photographed the residue covering the lens of an interior surveillance camera mounted on the upper wall. RP 213.

Simonson identified the photographs he described and which he took on the morning of Oct. 3rd, 2021, and they were admitted in evidence. RP 215–223 (Exhibits 1– 6, 8, 10–16). Simonson’s other significant role was to review surveillance footage on video with the harbormaster, Eric Widsteen. RP 223. Simonson obtained a blank thumb drive and provided it to Port Angeles Police Dept. (PAPD) Officer Moore. RP 224. Then the

blank thumb drive was used to download the surveillance footage. RP 224.

Simonson could not offer testimony as to the condition of the change machine. RP 225. Simonson also did not identify Osborn from the surveillance video. RP 226.

Eric Widsteen was the harbor master of Port Angeles Boat Haven and was responsible for managing day-to-day operations at the marina and boatyard at Port Angeles. RP 230. Widsteen had been the harbor master for about three years and assistant harbor master for three years prior to that. RP 230. Widsteen was very familiar with the properties within the marina and the laundry room. RP 231.

Widsteen identified and described what was in the photos admitted through Simonson's testimony. Widsteen described Exhibits 12 and 13 as the laundry facility on the east side of the marina. RP 231. Widsteen went to the laundry room about every other day as part of his duties to cleanup, check the garbage and collect quarters from the machine once a week. RP

232.

Widsteen testified that the laundry room was for tenants of the marina and they are given access to the laundry room with a card that works for the gate system and any locked areas available to tenants only. RP 232. Widsteen, having access to the marina records, was able to look up the names of all the tenants who had been given an access card. RP 233. Widsteen also had access to the motion activated surveillance camera in the laundry room and the video footage. RP 234–35. Widsteen described the equipment in the laundry facility and the change machine which would provide quarters in exchange for bills. RP 237.

On Oct. 3, 2021, Widsteen was alerted by a tenant that the change machine and countertop were missing from the laundry room. RP 237–38. Widsteen then contacted Simonson because he was the Director of Port security. RP 238.

Widsteen personally visited the laundry room and confirmed with his own eyes that the change machine and

countertop were missing. RP 238. Widsteen also personally observed that there was a substance covering the dome lens of the surveillance camera. RP 239.

Widsteen identified Ex. 4 admitted through Simonson as the area where the countertop and change machine should have been. RP 238–39. Widsteen identified Ex. 1, also admitted through Simonson, as a photo of the domed security camera that had been covered with some substance which looked like an attempt to blur the vision of the camera. RP 239.

Widsteen identified Ex. 20–23 as the flash drives with videos from the time when the change machine disappeared. RP 241. Exhibits 20–23 were then admitted through Widsteen’s testimony. RP 242. These videos were published to the jury and Widsteen described a woman entering through the door of the laundry facility. RP 245. Widsteen testified that this entry would have required an access card. RP 245. Widsteen did not recognize the woman that appeared in the video. RP 252.

John Lowell, a marina security officer, testified that on

Oct. 9, he was briefed on the laundry room theft and was provided information about a vehicle that was associated with the theft. RP 268–69, 274. This vehicle was a dark blue Mazda 3 compact car. RP 269. Lowell was going through the East Boat Haven parking lot when he observed such a car. RP 270. Lowell wrote the license plate number down as BXC4516. RP 271. Then Lowell saw a female with a white jacket with hood up walk from the bathrooms to the car. RP 271–72. Lowell provided the license plate number to PAPD and did not see the car again. RP 273.

Officer Zachery Moore reported to the scene of the theft on Oct. 3, 2021, and met with Mike Simonson at the Port. RP 279. Simonson showed Moore some damage inside the laundry room and a security camera that had white sticky substance on it. RP 279.

Moore took his own pictures which were identified and admitted as Exhibits 24–31 and which were published to the jury. RP 280–81. Moore described the photos as depicting the

inside of the laundry room where a wire had been cut and the area where the change machine and countertop table had been. RP 282. Moore also described the surveillance camera in the laundry room depicted in Ex. 28, 29, and 30.

Moore then went to the harbor master's office to see Mr. Widsteen and he reviewed surveillance footage. RP 283–84. Moore took a still photo from the footage depicting a female. RP 284. This photo was identified and admitted as Exhibit 32. RP 284–85, 286. Moore emailed the photo to all Clallam County law enforcement agencies. RP 285. Eventually, Moore showed the photo (Ex. 32) to Officer Jackson Vandusen, and Vandusen identified the female in the photo as Michele Osborn. RP 291.

Moore also received information on Oct. 6, 2021, that the license plate number BXC4516 was registered to Michele Osborn. RP 292–93, 294. Moore also looked at Dept. of Licensing (DOL) photos associated with the license plate registration and identified such a photo as Exhibit 34 which was



admitted in evidence. RP 298. Moore identified the person in the DOL photo as Michele Osborn. RP 298.

PAPD Officer Jackson Vandusen identified Osborn in person during the trial. RP 304. Vandusen testified that he had contact with Osborn on a couple occasions before Oct. 3, 2021, and one of those was memorable because it lasted approximately 15 minutes. RP 304–05. Vandusen was handed Ex. 32 and testified that it was the photo that Officer Moore showed to him in October. RP 306.

### **III. ARGUMENT**

#### **A. THE COURT PROPERLY ALLOWED REMOTE TESTIMONY BECAUSE IT WAS NECESSARY TO FURTHER AN IMPORTANT POLICY CONCERN AND THE RELIABILITY OF SIMONSON’S TESTIMONY WAS REASONABLY ASSURED.**

“The confrontation clause of the Sixth Amendment to the United States Constitution provides that a person accused of a crime has the right ‘to be confronted with the witnesses against him.’” *State v. Milko*, 21 Wn. App.2d 279, 287, 505 P.3d 1251 (2022) (quoting U.S. Const. amend. VI, Confrontation clause).

“Article I, section 22 of the Washington Constitution states that an ‘accused shall have the right ... to meet the witnesses against him face to face.’” *Id.* (quoting Const. art. 1, § 22).

A criminal defendant's right to have witnesses physically present at trial is meaningful and important. But it is not an indispensable element of the constitutional right of confrontation, and may be overridden when (1) ‘excusing the physical presence of the particular witness is necessary to further an important public policy’ and (2) ‘the reliability of the testimony is otherwise assured.’

*Milko*, 21 Wn. App.2d at 281 (quoting *State v. Foster*, 135 Wn.2d 441, 466, 957 P.2d 712 (1998)).

- 1. The court’s decision to allow remote testimony furthered an important public policy because Mr. Simonson had COVID-19 at a time when the risk of spreading infection was particularly high in Clallam County.**

Osborn concedes that the COVID-19 pandemic and need for those infected to isolate are important public policy reasons. Br. of Appellant at 7–8; *see also Milko*, 21 Wn. App.2d at 283 (“In February 2020, Governor Jay Inslee had proclaimed a state of emergency in Washington. He issued a number of

proclamations designed to help curb the spread of COVID-19. The Supreme Court ordered all courts to follow the most protective public health guidance applicable in their jurisdiction and to use remote proceedings for public health and safety whenever appropriate.”).

**2. The trial court relied upon substantial evidence for its decision to allow remote testimony.**

Alleged violations of confrontation clause are reviewed de novo, but the question of necessity is a mixed question of law and fact. *Milko*, 21 Wn. App.2d at 289–90 (citing *State v. Burke*, 196 Wn.2d 712, 725, 478 P.3d 1096, *cert. denied*, — U.S. —, 142 S. Ct. 182, 211 L.Ed.2d 74 (2021) and *Maryland v. Craig*, 497 U.S. 836, 840, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990)).

Under a mixed standard of review, the court reviews factual findings relative to finding of necessity for substantial evidence and reviews de novo the trial court's legal conclusion

that video testimony is necessary. *Milko*, at 289–90 (citing *State v. Davila*, 184 Wn.2d 55, 75, 357 P.3d 636 (2015)).

“Substantial evidence exists where there is sufficient evidence *in the record* to persuade a fair-minded, rational person of the truth of the finding.” *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994) (citing *State v. Halstien*, 122 Wn.2d 109, 129, 857 P.2d 270 (1993)) (emphasis added); *see also DeVogel v. Padilla*, 22 Wn. App.2d 39, 48, 509 P.3d 832 (2022) (citing *Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003)).

The reviewing court “will not substitute [its] judgment for the trial court's, weigh the evidence, or adjudge witness credibility.” *DeVogel*, 22 Wn. App.2d at 48 (citing *Greene v. Greene*, 97 Wn. App. 708, 714, 986 P.2d 144 (1999)).

Here substantial evidence in the record supports the court's conclusion that remote testimony was *at least* reasonably necessary under the circumstances.

The court relied upon the deputy prosecutor's relay of information from Simonson that he was positive for COVID-19. The court understood that Simonson would be in a room with about 12 jurors and an alternate, court personnel, the parties, and public observers. *See* RP 350. The court was aware of the transmission rate of COVID-19 and it was particularly high. The court also put on the record the current numbers regarding the particularly high infection rate for COVID-19 within Clallam County. The court noted that the numbers were coming down but were still very high at 600 per 100,000 persons.<sup>1</sup> RP 40.

Although this evidence could have been more exhaustive, it was sufficient to persuade a fair minded rational minded person that Simonson was infected by COVID-19 and that the

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<sup>1</sup> The record does not reflect whether 600 figure was based on a 7-day or 14-day case rate. Information regarding historical case rates in Clallam County may be found at <https://doh.wa.gov/emergencies/COVID-19/data-dashboard>, and the risk levels may be found at <https://doh.wa.gov/emergencies/COVID-19/data-dashboard>, CURRENT STATUS, Learn More, last visited April 14, 2023.

transmission rate was particularly high in Clallam County such that having Simonson in the courtroom during the trial would create a serious public health risk.

Osborn argues that the court did not consider alternatives to remote testimony and did not make findings based upon affidavits. Osborn fails to present any authority that consideration of alternatives and findings based on affidavits are required before the court may approve remote testimony.

On the contrary, unsworn statements have been utilized in the determination of whether the government has identified the presence of an important public policy. *See State v. Sweidan*, 13 Wn. App.2d 53, 58, 461 P.3d 378 (2020).

In *Sweidan*, “[n]either [the witness] Haddad nor [the witness’ doctor] Hasso wrote their respective statements under oath or under penalty of perjury[.]” *and* the trial court did not make written findings. *Id.* at 58, 60. Nevertheless, the *Sweidan* Court concluded that an important public policy was present which could support remote two-way video testimony provided

it was necessary. *See Sweidan*, at 53; *see also id.* at 72 (citing *Maryland v. Craig*, 497 U.S. 836, 850, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) (“*Maryland v. Craig* actually establishes a three-part test: (1) *an important public policy is present*, . . . .”)). However, the *Sweidan* Court held, that despite the presence of an important public policy, the State failed to establish that remote testimony was necessary absent any information as to whether another caregiver could take care of the witness’ ill mother, or whether the mother would recover shortly or was terminally ill such that the trial could have been continued. *Id.* at 73.

Here, all that was required for the court’s finding was substantial evidence *in the record*, not affidavits. *See Hill*, 123 Wn.2d at 644. Further, the court justifiably relied upon the deputy prosecutor’s assertion as an officer of the court that Mr. Simonson reported he was currently positive for COVID-19. *See State v. Israel*, 19 Wn. App. 773, 577 P.2d 631 (1978) (showing that a court may accept representations by an attorney

as an officer of the court). The trial court's credibility determinations of the deputy prosecutor and Mr. Simonson are not at issue on review. *DeVogel*, 22 Wn. App.2d at 48.

Therefore, the court relied upon substantial evidence in the record for its decision to allow remote testimony.

**3. Remote testimony was at least reasonably necessary considering that Simonson had COVID-19 at a time when the risk of spreading infection was particularly high and the reliability of Simonson's testimony was assured.**

The Court of Appeals, Div. 2, in *State v. Milko* adopted parameters for the definition of "necessary" from *State v. Sweidan. Milko*, 21 Wn. App.2d at 291 (citing *Sweidan*, 13 Wn. App.2d at 72–73).

“‘[N]ecessary’ in the context of allowing remote testimony means more than merely convenient but less than an absolute physical necessity.” *Id.* “The law rarely, if ever, requires absolute or indispensable necessity in any setting.” *Sweidan*, 13 Wn. App.2d at 72 (citing *Central Puget Sound Regional Transit Authority v. WR-SRI 120th North LLC*, 191



Wn.2d 223, 245, 422 P.3d 891 (2018). “Generally, the word “necessary” means reasonable necessity, under the circumstances of the particular case.” *Id.* (citing *Central Puget Sound Regional Transit Authority*, 191 Wn.2d at 245).

In order to determine whether there are compelling reasons for allowing video testimony, “[t]he trial court must thoroughly consider the proffered reasons why a witness cannot appear in person and conduct an evidentiary hearing *if appropriate*. And the court must critically analyze those reasons to determine if they actually are necessary to further an important public interest.” *Milko*, 21 Wn. App.2d at 291 (emphasis added).

“[C]oncern for the health of a third person may be sufficient to support a finding of necessity.” *Milko*, 21 Wn. App.2d at 292 (citing *Sweidan*, 13 Wn. App. 2d at 71) (“This is especially true in a pandemic. Given the nature of the COVID-19 pandemic, the risk to the health of Biddulph and her child if

Biddulph was required to travel to Washington was significant and more than de minimis.”)).

Here, the circumstances in this case fall squarely within the definition of necessary. The trial court thoroughly considered the reasons suggested for remote testimony. The court considered the current numbers regarding the high infection rate for COVID-19 within Clallam County and also noted that although the numbers were coming down, they were still very high at 600 per 100,000 persons.

Further, the trial court permitted remote testimony not because it was merely convenient, but because Simonson’s physical presence could create a serious health risk to the jurors, other participants in the trial, and the public. The infection rates were particularly high and although contracting COVID-19 may have been a minor inconvenience for some, for others, the risk to health and life could be dire.

The preference for face-to-face confrontation must give way where there is possible risk to the health and possibly life

of two witnesses and their family members. *See Milko*, at 291–92. Where the risk is more actual and extends to many, the threshold for showing that remote testimony is necessary under *Milko* and *Sweidan* has doubtlessly been surpassed.

In *Milko*, that threshold was surpassed due to *the risk* two witnesses could contract COVID-19 during air travel. It was not absolutely known if any passengers on board would be carrying the virus and there was no discussion about whether all passengers were required to test negative prior to boarding. *See Milko*, at 282–83.

In contrast, in this case, Mr. Simonson was positive for COVID-19 creating an actual risk to others. Clearly, as in *Milko*, the risk to the health of the jurors, parties, court personnel, and public was significant.

Therefore, remote testimony was reasonably necessary under the circumstances of this case. Moreover, unlike the witnesses in *Milko*, Simonson’s testimony was largely duplicative. Simonson had no role in the identification of the

defendant as the person who committed the burglary or stole the coin machine and damaged the laundry facility.

Considering the high risk of COVID-19 transmission and the nature of Simonson's testimony, an evidentiary hearing would not have been appropriate where the court trusted the credibility of Mr. Simonson and the deputy prosecutor and there is no evidence suggesting any falsehoods. Furthermore, it was unknown when the pandemic would end or transmission rates of COVID-19 would be acceptable, or whether or when any other witness would become infected.

Therefore, remote testimony was reasonably necessary under the circumstances.

Finally, the reliability of Simonson's testimony was assured as two-way video testimony has been deemed reliable absent evidence to the contrary. *See Sweidan*, 13 Wn. App.2d at 74–75.

Further, Simonson's observations were corroborated by the photographs he took and photographs taken by Off. Moore which were largely duplicative.

Therefore, the reliability of Simonson's testimony was assured.

**4. Simonson's remote testimony was harmless beyond a reasonable doubt because it was duplicative, it provided nothing substantive toward proving Osborn's guilt, and the State's case was strong.**

Confrontation clause violations are subject to harmless error analysis. *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *State v. Davis*, 154 Wn.2d 291, 305, 111 P.3d 844 (2005).

"The correct inquiry is whether, assuming that the damaging potential of the testimony was fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *State v. Saunders*, 132 Wn. App. 592, 604, 132 P.3d 743 (2006) (citing *Van Arsdall*, 475 U.S. at 684).

“Factors bearing on this inquiry include ‘the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and ... the overall strength of the prosecution's case.’” *Id.* (quoting *Van Arsdall*, 475 U.S. at 686–87).

Here, Simonson’s testimony had no role in proving the defendant’s identification unlike in *Miklo* where remote testimony of two witnesses was found to be harmless beyond a reasonable doubt.

One witness, Ms. Biddulph, was the sexual assault nurse examiner who completed a rape kit leading to identification of Milko’s DNA. *Id.* at 282. The other witness, JA, was a victim in another incident in Florida who was victimized by Milko under similar circumstances as the victims in the current case. *Id.* The State introduced JA’s testimony to “establish identity, a common scheme or plan, and/or modus operandi.” *Id.* at 287.

Here, Simonson's testimony had absolutely no role in proving the defendant was the person who committed the crimes charged. Additionally, Simonson's testimony and the photographs he took were duplicative. Moreover, Simonson testified that he was not even truly familiar with the laundry facility; he was just aware of what it is and where it is.

Simonson took photos of the laundry facility showing where the missing coin machine was, where the countertop was removed from the wall, the cut cable, and the surveillance camera with residue covering the dome lens. Off. Moore took photos of the same items which were admitted as Exhibits 24–31.

Even Simonson's description of what was in the photos was duplicated by Off. Moore's testimony. Moore described the photos as depicting the inside of the laundry room where a wire had been cut and the area where the change machine and table had been. RP 282. Moore also described the surveillance camera in the laundry room depicted in Ex. 28, 29, and 30.

Chris Rasmussen, the public works and operations manager, and the harbormaster, Eric Widsteen, were familiar with the laundry facility, unlike Simonson, and provided testimony describing what they saw with their own eyes. Both Rasmussen and Widsteen personally visited the laundry room and confirmed that the change machine and countertop were missing. RP 190, 238. They also observed that there was a substance covering the dome lens of the surveillance camera. RP 190, 239.

Finally, the state's case was strong considering that Osborn was identified as the person in the surveillance video by Off. Vandusen and the vehicle present at the time was proved to be registered to Osborn.

Based upon the above, beyond any reasonable doubt, the jury would have come to the same verdicts absent Simonson's testimony.

Therefore, the alleged error is harmless and this Court should affirm.



## CONCLUSION

The COVID-19 pandemic posed an actual threat to the health and lives of the overall population, especially to more vulnerable persons due to age and pre-existing health issues. As a result, the Washington Supreme Court ordered all courts in Washington “to follow the most protective public health guidance applicable in their jurisdiction and to use remote proceedings for public health and safety whenever appropriate.” *Milko*, 21 Wn. App.2d at 283. Thus, protecting the population from contracting and spreading COVID-19 was a compelling public policy.

The court’s conclusion that remote testimony was necessary was proper because Simonson was positive for COVID-19 and his presence at a public trial created a real risk of the continued spread of COVID-19 to others.

This conclusion was supported by substantial evidence in the record consisting of the representations of the deputy prosecuting attorney that Simonson was positive for COVID-19

and that the current transmission rates of COVID-19 in Clallam County were particularly high.

Finally, the reliability of Simonson's testimony was assured because he was subject to cross-examination through two-way video. *See Sweidan*, 13 Wn. App.2d at 74–75.

Moreover, remote testimony was appropriate because Simonson's testimony was not so important to the case considering that it was corroborated by not only photos Simonson took of the scene, but also by Officer Moore's photos and testimony and the testimony of the harbormaster, Mr. Widsteen. Further, Simonson had no role in the identification of the defendant. Under these circumstances, the preference for face-to-face confrontation was not particularly heightened.

Therefore, the court's decision to allow remote testimony was supported by substantial evidence and the court's legal conclusion that remote testimony was necessary was sound.

Finally, the trial court's decision allowing remote testimony was harmless beyond a reasonable doubt. Off. Moore

and the harbormaster independently provided the same testimony as Simonson regarding the stolen coin machine, missing countertop, and residue on the camera lens.

Further, Simonson had absolutely no role in identifying the defendant or in viewing and downloading surveillance.

Therefore, the jury, beyond any reasonable doubt, would have come to the same conclusion and verdict had Simonson not testified at all.

For all the above reasons, this Court should affirm.

**B. THE THEFT CONVICTION WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE.**

The State was required to prove that the value of property stolen exceeded \$750.00 in value. CP 50. Value was defined in instruction no. 18 as “the market value of the property at the time and in the approximate area of the act.” CP 52.

The only values the State introduced regarding the stolen change machine was the original cost in 2016 and the current replacement value. Even Mr. Rasmussen’s estimate was to determine the cost to repair and replace. RP 195, 203–04. The

State's argument in closing was that the machine cost over \$750.00. RP 340.

There was no testimony as to the condition of the change machine. Assuming it was in good condition, the purchase price was too remote in time to use it to infer the present market value five years later.

Further, there was no showing that the change machine had *no* market value such that the other values might have been admissible. *See generally, State v. Ehrhardt*, 167 Wn. App. 934, 944–46, 276 P.3d 332 (2012).

Therefore, the State concedes that there was insufficient evidence of market value exceeding \$750. This Court should dismiss the conviction for Theft in the Second Degree.

**C. THE CLAIM OF INEFFECTIVE ASSISTANCE IS MOOT.**

“An appeal must be dismissed if the questions are moot . . . .” *State v. Enlow*, 143 Wn. App. 463, 470, 178 P.3d 366 (2008) (citing *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)). “A case is moot

when, ‘a court can no longer provide effective relief.’” *Id.* (quoting *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984)); *see also Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 165, 795 P.2d 1143 (1990) (reviewing court need not decide all the issues raised by the parties, but only those that are determinative).

The remedy for insufficient evidence is dismissal. *State v. McKee*, 193 Wn.2d 271, 276. 438 P.3d 528 (2019); *State v. Batson*, 194 Wn. App. 326, 339, 377 P.3d 238 (2016).

The remedy for ineffective assistance of counsel is remand for a new retrial. *See State v. Sutherby*, 165 Wn.2d 870, 888, 204 P.3d 916 (2009); *State v. Thomas*, 109 Wn.2d 222, 232, 743 P.2d 816 (1987); *State v. Powell*, 150 Wn. App. 139, 158, 206 P.3d 703 (2009).

Count 3, Theft in the Second Degree, should be dismissed for insufficient evidence. Thus, the issue of ineffective assistance is moot because a new trial may not be

granted and this Court cannot grant further relief. *See State v. Harris*, 164 Wn. App. 377, 388, 263 P.3d 1276 (2011) (finding that reversal instructional error and dismissal of charges related to a pattern or practice of abuse of a child rendered the claim of ineffective assistance moot).

#### **IV. CONCLUSION**

Substantial evidence in the record supported the trial court's conclusion that remote testimony was necessary for a witness who was positive for COVID-19 while transmission rates were particularly high in Clallam County.

Simonson's testimony played no role in identifying the defendant. Additionally, Simonson's testimony was largely duplicative and the State's case was strong.

Therefore, a jury would have returned the same verdict absent Simonson's testimony and any error from allowing remote testimony was harmless beyond a reasonable doubt.

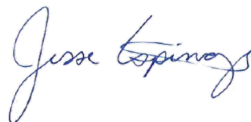
The State concedes that the conviction for Theft in the Second Degree should be dismissed due to insufficient evidence. This renders the ineffective assistance claim moot.

For all the foregoing reasons, this Court should affirm the remaining convictions for Burglary in the Second Degree and Malicious Mischief in the Second Degree. The Court should also remand the case to vacate the conviction for Theft in the Second Degree and for resentencing.

This document contains 5,469 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 28th day of April, 2023.

MARK B. NICHOLS  
Prosecuting Attorney

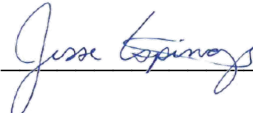
A handwritten signature in blue ink, appearing to read "Jesse Espinoza", with a stylized, cursive script.

JESSE ESPINOZA  
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Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically to Jennifer Sweigert on April 28, 2023.

MARK B. NICHOLS, Prosecutor

  
Jesse Espinoza



**CLALLAM COUNTY DEPUTY PROSECUTING ATTORNEY**

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